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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms with those regulations.

Arrest of Ships in Germany and South Africa – a Comparison

1. Bibliography.....	4
1.1. Table of Conventions	7
2. Table of Statutes.....	7
3. Table of Cases	8
4. Introduction	9
5. The Main Applicable International Conventions	10
5.1. The 1952 Arrest Convention.....	10
5.2. The 1999 Arrest Convention.....	15
6. Arrest of ships in Germany	17
6.1. Sources of National Law & Applicable International Conventions.....	17
6.2. Competency of Courts or other Authorities	18
6.3. Immunity of State-Owned Vessels	20
6.4. Claim of Arrest.....	20
6.4.1. Money Claim.....	21
6.4.2. Debtor.....	22
6.5. Reason to Arrest.....	24
6.6. Primacy of the Arrest Convention.....	34
6.7. Definition of „Vessel“.....	36
6.8. Sister Ships.....	38
6.9. Procedures of Arrest.....	38
6.9.1. Form of the Arrest Application	38
6.9.2. Security by the Arresting Party	39
6.9.3. Representation by Counsel; Power of Attorney.....	39
6.9.4. Court Hearing.....	40
6.9.5. Security by the Defendant.....	40
6.9.6. Costs of the Courts Proceedings	41
6.9.7. Execution of the Arrest Order	41
6.9.8. Appeal by the Defendant.....	42
6.9.9. Auction Sale in the Arrest Proceedings & Priority of Claims	43
6.10. Inadmissible Arrest	44
7. Arrest of ships in South Africa.....	45
7.1. Sources of National Law & Applicable International Conventions.....	45
7.2. Jurisdiction of the Courts & Form of Proceedings	46
7.2.1. Actions <i>in personam</i> , Section 3 (2) of the Act.....	47
7.2.2. Actions <i>in rem</i> , Section 3 (4 & 5) of the Act	49
7.2.3. Security Arrests.....	53
7.3. Immunity of State-Owned Vessels	54
7.4. Claim of Arrest.....	55
7.5. Associated Ship Arrest.....	57
7.6. Chartered Vessels.....	62
7.7. Definition of "Vessel"	63
7.8. Form of Application.....	63
7.9. Security of the Arresting Party.....	64
7.10. Representation by Counsel & Power of Attorney.....	64
7.11. Court Hearing.....	64
7.12. Release upon Security	64
7.13. Costs of Court Proceedings.....	65
7.14. Time Element.....	66
7.15. Auction Sale in the Arrest Proceedings & Priority of Claims	66

7.16.	Claims for Damages by the Owner of the Arrested Vessel	67
8.	Conclusion	69

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1.1. Table of Conventions

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- The International Convention on the Unification of Rules Relating to the Arrest of Sea-Going Vessels of 10 May 1952
- The EC Convention of 27 September 1968 Concerning Civil Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters as amended by accession conventions dated 9th October 1978, 25th October 1982 and 26th May 1989
- The International Convention on Arrest of Ships, 1999

2. Table of Statutes

South African Statutes

- Admiralty Jurisdiction Regulation Act 105 of 1982
- Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions or the Appellate Division of the Supreme Court of South Africa No. 571
- Admiralty Jurisdiction Regulation Amendment Act 87 of 1992
- Foreign States Immunities Act No. 87 of 1981

German Statutes

- Bürgerliches Gesetzbuch of 18.8.1896, as amended
- Handelsgesetzbuch of 10 May 1897, as amended
- Zivilprozessordnung of 1 January 1877, as amended

3. Table of Cases

German Cases

- AG Hamburg, VersR 1987, p. 1236
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- OLG Düsseldorf, Hamburger Seerechts-Report 2007, p. 125.
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4. Introduction

The well-known German legal author *H-J Puttfarken* prefaces his remarks on the arrest of a vessel with the striking sentence „*The arrest of a vessel is just as much a part of seafaring as distress, pirates and congested ports*“.

Even if this comparison is doubtful since in opposition to an arrest, „distress, pirates and congested ports“ are no legal institutes that are regulated by procedural rules.

But the sentence shows the popularity of the maritime arrest, at least in the view of many ship owners, charters, etc.

On the other hand the arrest of a vessel has now for ages often been the only possibility for debtors to realize a claim against ship owners, charterers, etc.

The vessel, typically registered in some obscure legislation and cruising around in the world sea-lanes often constitutes the only valuable asset of a company, which itself is registered in some sunny island-state.

This and much more makes the arrest of vessel so import for the world shipping business.

This thesis aims on a comparison of two completely different legal systems – one a mixture of different legal traditions and one a classical civil law jurisdiction. The thesis takes a practical approach to show differences and similarities that are relevant for the praxis. Thus the thesis does not focus a lot on the historical background, but rather shows the law and procedures how they are now.

On some points which are supposed to be important, the thesis will go into details, but not on all points.

Besides the two legal systems the thesis will also present some important points of the relevant international conventions since they have become very import in world shipping.

5. The Main Applicable International Conventions

5.1. The 1952 Arrest Convention

Already in the 1930's states began to think about an international convention concerning the arrest of ships, but such a convention did not come into effect until 1952. In May 1952 a diplomatic conference in Brussels resulted in the „International Convention on the Unification of Rules relating to the Arrest of Seagoing Ships“¹. The purpose of the Convention was to restrict the possibilities to arrest ships in the ports of the contracting states and to uniform the rules for an arrest among the contracting states.

The Convention is the result of a compromise between two different law systems: the Common Law System (Anglo-American) on the one hand and the Civil Law system (Continental Europe) on the other hand.

The 1952 Arrest Convention consists out of two main parts: Articles 2 to 6 regulate the conditions for arresting a ship and its release, while Article 7 deals with the jurisdictional matters in accordance with the previous articles.

The compromise character of the Convention may best be seen in the fact that one requirement of an arrest is that the arrest claim has to be a maritime one.

In Civil Law a vessel is a common asset like a car or a watch. Such an asset may be arrested no matter whether the claim to be secured is of maritime or non-maritime nature.

In Common Law a vessel may only be arrested for maritime claims that arose from the operation of the particular vessel.

¹ „1952 Arrest Convention“

According to Article 2 of the 1952 Convention an arrest is allowed in respect of any maritime claims conforming with the definition in Article 1 of the Convention.

These are the majority of claims that could arise with regard to the operation of a ship:

- (a) damage caused by any ship either in collision or otherwise;
- (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
- (c) salvage;
- (d) agreement relating to the use or hire of any ship whether by charter party or otherwise;
- (e) agreement relating to the carriage of goods in any ship whether by charter party or otherwise;
- (f) loss of or damage of goods including baggage carried in any ship;
- (g) general average;
- (h) bottomry;
- (i) towage;
- (j) pilotage;
- (k) goods or materials wherever supplied to a ship for her operation or maintenance;
- (l) construction, repair or equipment of any ship or dock charges and dues;
- (m) wages of Masters, Officers, or crew;
- (n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
- (o) disputes as to the title to or ownership of any ship;
- (p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.

The claims under lit. o) to q) are of a special nature since they are not always related to money. For that reason e.g. Germany reserved the right not to apply the Convention to the arrest of a vessel for any of the claims enumerated in lit. o and p of Article 1, but to apply its domestic laws to such claims, as well as the right not to apply the first paragraph of Article 3 to the arrest of a vessel, within the jurisdiction, for claims set out in Article 1, lit. q, according to Article 10 a resp. b, because in these cases the claim is not only directed to a money claim and could therefore be secured by a temporary injunction according Section 935 Code of Civil Procedure².

Some maritime related money claims are not mentioned, such as insurers' claims for overdue premium or claims of social security institutions for contributions.

As usual in conventions, there are exemptions to the rules. An important exemption is laid out in Article 2.

According to Article 2 of the 1952 Convention,

“A ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claim, but in respect of no other claim but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction”.

However this exception is only applicable to secure claims under public law, private claims of authorities are not covered under this exception.³

According to Article 3 (1) of the 1952 Convention, the *“claimant may arrest either the particular vessel in respect of which the maritime claim arose, or any other vessel which is owned by the person, who was, at the time, when the maritime claim arose, the owner of the particular vessel in*

² „Zivilprozessordnung“ (hereafter „ZPO“).

³ Berlingieri, „The 1952 Brussels Convention on Arrest“, in: Essays on Maritime Liens and Mortgages and on Arrest of Ships, 1984, pp. 116 ff.

respect of which the claim arose, even though the vessel arrested be ready to sail", if such is permitted by the applicable law. E.g. in Germany a vessel to be arrested must be in a harbour, sec 482 HGB. Under German law it would not be allowed to arrest a vessel that is sailing. If the owner himself or another ship of the same operator (sister ship) is liable for the maritime claim, the creditor may even obtain security in arresting the sister ship. According to Article 2 (2) this is also possible if any other owns all shares in the vessel. To understand and interpret this provision, the following examples might be helpful:

"Within these examples, A shall be the vessel in respect of which the claim arose and B shall be another vessel.

If vessel A is fully owned by X and vessel B by X and Y, vessel B cannot be arrested because of a maritime claim.

If vessel A is owned by X and Y, however, and vessel B is fully owned by X, vessel B can be arrested because of a maritime claim.

If vessel A is owned half by X and each a quarter by Y and Z and vessel B is owned to equal shares by X, Y and Z, vessel B can be arrested because of a maritime claim.

If the vessel A and the vessel B owned by two joint stock companies and all stocks are held by X, vessel B cannot be arrested because of a maritime claim because the companies are considered as being two independent legal persons."⁴

The creditor may therefore only arrest one ship per claim, the one in respect of which the claim arose or one of its sister ships.

⁴ Berlingieri, note 3, pp. 129 ff.

A creditor is also just allowed to arrest only one ship or to be given bail or other security for more than one ship in respect of one maritime claim in any of the contracting states, sec 3(3).

If a creditor succeeds in obtaining a second arrest warrant (or bail or other security) for the same maritime claim, the first arrest warrant shall be removed. Otherwise the creditor would be able to obtain an arrest warrant in different contracting states and might choose the jurisdiction that suites him best later on.

An exception from these rules may be granted where a creditor is able to proof that the security he obtained is not sufficient in the particular circumstances, e.g. when it is not possible for the creditor to realize the security provided for any reason he has to proof.

An important fact to keep in mind is, that the liability of a ship concerning maritime claims after the 1952 Convention is not affected by the change of ownership. Therefore even a *bona fide* purchaser not aware of debts attached to the vessel through acts of the previous owner, risks the arrest of the ship because of these debts.

Art 5 states that an arrest of a vessel has to be lifted by the court if sufficient security is provided concerning the maritime claim.

In case of doubt the court has to decide which security would be appropriate.

Another important issue is the fact that the contracting states did not agree on common provisions on damages to be paid by the creditor in case of the vessels' release. That has to be determined by domestic rules. Article 6 states, that that the liability of the creditor for damages in case of a wrongful arrest is determined by the domestic law where the warrant of arrest was granted, e.g. in Germany that would mean strict liability.

Besides these basic provisions the contracting states did not agree on a further unification with regard to the law of maritime arrest.

According to Article 6(2) in connection with Article 9 the arrest proceedings are governed by the law of the state in which the arrest was made or applied for.

Anyhow it will be shown later that this is not entirely true at least in respect of Germany, because the 1952 Convention contains some basic provisions that precede the national law.

Article 7 sets out conditions under which the same court also has jurisdiction to determine a case on its merits. This question of the possibility of bringing the main action at the place of arrest is very important for the practice. If an arrest gives rise to a forum, the creditor is often able by choosing the place of arrest to determine the applicable law. This judicial “trick” is known as “forum shopping”. “Forum shopping” was supposed to be eliminated by the 1952 Convention, but it did not work out. The 1952 Convention does not limit the places of arrest, e.g. by a closed list. Neither is a real connection between the legal dispute and the State of arrest required, nor has there been an international unified substantive law established, which could have at least theoretically excluded the advantages of “forum shopping”.

According to Article 8(1) these rules are applicable to all ships flying the flag of a contracting State. All ships not flying the flag of a contracting State may be fully or partly excluded from the advantages of the Convention.

The 1952 Convention does not cover any claims involving a state-owned vessel. A private party cannot arrest a state-owned vessel.

5.2. The 1999 Arrest Convention

The Shipping Industry changed a lot since the 1950's, just note the container boom since the late 60's, the rise of so-called flag of convenience, the focus on environmental issues, the boom of worldwide trade, etc.

Therefore a lot of players in the business called for a review of the 1952 Convention. But as often in international law, in an issue with so many parties with different interests involved, that takes decades.

The reviewed convention was to produce a legal framework that would protect the interests of cargo owners and ships by securing the free

movement of ships and by prohibiting arrest for unjustifiable claims not related to the operation of the ship.

Arrest was to be kept as an exceptional measure to be used only as a last resort to secure a maritime claim.

The major issue between the opposing parties in the drafting process remained the question, if the new Convention should adopt a similar approach to that of the 1952 Convention and should provide a closed list of maritime claims, or whether it should adopt a more flexible approach by retaining an open-ended list. A broad definition of „maritime claims“ along with the indicative list of particular claims was supposed to give greater flexibility, but perhaps at the expense of legal certainty.

This question was left to a diplomatic conference that was held in 1999 and presented the draft of the 1999 Convention.

It was essential that the new Convention should succeed in striking a balance between the interests of cargo owners and operator in securing the free movement of ships and the right of claimants to obtain security for their claims.

The final text presented a number of compromises between those States traditionally representing interests of the operator and those aiming to make it significantly easier to enforce legitimate maritime claims without creating any undue impediment to trade.

There are several notable additions to the 1952 Convention. Article 1 (1) (d) e.g. is referring to environmental issues, which had not been a major issue in 1952.

Also the list of maritime claims was enlarged to wreck removal (e), ship management services (l), insurance premiums and mutual insurance calls (q), commissions and brokerages (r) and ship sale contracts (v).

The 1999 Convention also includes so-called „Mareva“ type injunctions.

There are some additions and changes to the 1952 Convention.

But after all, the international rules on maritime arrest, however, are solely of procedural nature and need enforcement by the domestic laws.

And, not to forget of course, the 1999 Convention is not in force yet.

In the following this paper deals with the practical conditions of ship arrest under German and South African law.

6. Arrest of ships in Germany

6.1.Sources of National Law & Applicable International Conventions

The main provisions on maritime arrest under German law are to be found in Sections 916 to 934 ZPO and in Sections 943 to 945 ZPO. Supplementary procedural provisions are found in the ZPO as well.

Section 931 ZPO specifically deals with the arrest of vessels flying the German flag.

Section 482 HGB states that a sea-going vessel, that is „en route“ may not be arrested until it calls in a port.

These national rules are mainly supplemented by three international conventions:

aa) The Federal Republic of Germany is a party to the International Convention Relating to the Establishment of Uniform Rules Concerning the Immunity of State-owned Vessels of 10 April 1926, Brussels, and the Supplementary Protocol of 24 May 1934.

bb) Germany has also ratified the 1952 Convention.

cc) Germany is as well a party to the EC Convention of 27 September 1968 Concerning Civil Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters as amended under Article 24 of the Convention of Accession of 9 October 1978, Brussels.⁵

Under Article 24 of the Convention, the provisions on national jurisdiction will prevail in the event of an arrest.

⁵ Federal Law Gazette 1983 II p. 802.

dd) Germany has not signed any bilateral agreements to prevent vessels of the contracting states from being arrested.

6.2. Competency of Courts or other Authorities

Section 919 ZPO states, that either the court competent to conduct the main proceedings or the local court in whose district the vessel is located, has jurisdiction to issue a warrant of arrest. Most likely an arrest concerning a vessel that is owned by a foreign ship owner will be based on Section 23 ZPO, pursuant to which an action can be brought against a debtor in the place where the debtor has assets.⁶

Considered as assets are all items/objects that have a monetary value (objects or rights) and a current market value of their own.⁷ It is not required that the assets are seizeable or that they have a fair value in relation to the amount in dispute of the lawsuit.⁸

If a dispute should be subject to an arbitration agreement, the arbitrators are entitled to render orders of injunction or arrest by themselves. They may also demand securities from the parties.

The wording of both statutes seems to give a wide jurisdiction to German courts concerning the arrest of foreign vessels.

But the Federal Supreme Court (BGH) ruled, that concerning Section 23 ZPO, a case has to have a link with Germany und that a mere presence of assets of the defendants in Germany is not sufficient to give a German court jurisdiction.⁹

If there is a sufficient link or not is a question of each individual case.

The jurisdiction states that a sufficient link exists in the following constellations:

⁶ Looks, Maritime Law Handbook, Part I-2.

⁷ OLG Düsseldorf, Hamburger Seerechts-Report 2007, p. 125.

⁸ OLG Düsseldorf, *ibid.*

⁹ BGHZ 115, p. 94.

- One party is a German national or the domicile/residence of one party is in Germany
- The business connexion between the parties originated in Germany
- German law is applicable
- The defendant is actively involved in the German business life. That is appropriate in cases where the location of assets of the defendant in Germany is based on a sensible investment decision; when the defendant invests in Germany to take advantage of the German economical system for own purposes.
- There is a special connection of the preservation of evidence to German courts, e.g. important witnesses are domiciled in Germany.¹⁰

The decision of the Federal Supreme Court (BGH) was thought to be applicable to Section 919 ZPO as well.

Applying these principles it would be much more difficult than it was before that said judgement to arrest foreign sea-going vessels in Germany.¹¹

There are however a lot of objections against the ruling of the Federal Supreme Court, because the restrictive interpretation of Section 23 ZPO by reference to a national connecting factor is not reflected in the wording of the law.¹²

Another Senate of the Federal Supreme Court ruled, that a connecting national factor is only justified in certain cases that deal with court procedures leading to a judgement, in which the jurisdiction of the court is based on Section 23 ZPO.¹³

But in cases, where the jurisdiction of a court is based on Sections 722, 723 and 23 ZPO, as part of proceedings for the recognition of a foreign judgement, recourse to the German court could not be made subject to

¹⁰ OLG Düsseldorf, *ibid.*

¹¹ Looks, *ibid.*, p. I-2.

¹² Baumbach/Lauterbach/Hartmann, § 23 ZPO, marginal note 16 with further references; Kienzle, „Arrest in Seeschiffe“, p. 75.

¹³ BGH, NJW 1997, p. 325.

further conditions, „particularly a more extensive national connecting factor“. ¹⁴ This would not fit with the wording of said Sections. Therefore, if a seizure order is obtained to secure the enforcement of a foreign judgement, according to Section 919 ZPO, no further national connecting factor requirement can be demanded, with regard to the jurisdiction of the court, at the place where the property is situated. ¹⁵ It can also not make a difference, whether the seizure order is being obtained to secure a foreign or national judgement. Therefore, irrespective of criticism of the decision of the Federal Supreme Court, according to Section 919 ZPO, it will suffice for the jurisdiction of the local court to apply that the ship is located within that court's district. ¹⁶

The 1952 Convention itself also offers in Article 7 (1) several possibilities to determine the jurisdiction.

6.3. Immunity of State-Owned Vessels

Article 1 of the Brussels Convention of 1926 concerning the Immunity of State-Owned Vessels states, that state-owned vessels serving commercial purposes are subject to the same rules as private vessels and therefore do not enjoy immunity. On the other hand, state-owned vessels serving public purposes (Navy, etc.) enjoy immunity from arrest.

6.4. Claim of Arrest

Section 916 (1) ZPO states that an arrest serves to provide security in relation to a claim for money or a claim that may become a claim for money.

¹⁴ Looks, JIML 12 (2006), p. 424.

¹⁵ Looks, *ibid.*

¹⁶ Looks, *ibid.*

6.4.1. Money Claim

A claim „which may become a money claim“ is relevant e.g. in cases of non-performance or defective performance.¹⁷

Therefore a money replacement claim that is alternatively secured might e.g. be a claim to issue a correct bill of lading.

E.g. in one case the plaintiff chartered the vessel „M.S.T.“ under a Gencon-charterparty dated 16 August 1971 for the defendant to ship wheat flour from Bremen and Hamburg to Saudi Arabia and Yemen.

The master gave out a clean B/L in Bremen for the first part of the loading according to a draft of the plaintiff.

Before loading the second part in Hamburg, beetles were discovered in the first part of the loading and the vessel was gassed for two days.

But after the loading of the second part began, beetles were discovered again.

Thus the vessel was gassed again and this time the action was successful. The competent authorities issued certificates and a marine surveyor stated that no damage to the cargo occurred and that the used pesticide complied with German laws.

Thus the plaintiff requested a clean B/L from the defendant. However the defendant was not willing to issue a clean B/L until the plaintiff issued a letter of indemnity for all possible claims and costs and an agreement letter that the plaintiff would cover all the costs, expenses and demurrage charges.

Thus the defendant obtained a temporary injunction which however was successfully objected against by the defendant and an appeal was dismissed as inadmissible.

However the Higher Court of Hamburg stated that the plaintiff did have a claim in terms of Section 916 (1) ZPO. According to the court, the claim for issuing a clean B/L would change into a claim for damages in case of non-performance.

¹⁷ Baumbach/Lauterbach/Albers/Hartmann, ZPO, Sec 916, marginal note 5.

6.4.2. Debtor

In connection with a claim under Section 916 (1) ZPO it is irrelevant whether such a claim has arisen in connection with the use of the vessel to be arrested. If there exists a claim against the owner of a vessel, under German law all his assets may be arrested in the same way as other of his personal effects.

There might however arise difficulties where the creditor wants to arrest a ship with regard to a maritime lien. This would become of practical importance if the debtor and the owner of the vessel encumbered with the lien were different persons, since an arrest is only allowed into assets of the debtor.¹⁸

Judgement debtors in German law can be natural or legal persons. Both would be considered as operators in maritime transport for profit-making purposes in terms of Section 484 HGB.

A demise charterer e.g. is defined as a person not owning a ship, but using it for profit-making purposes for his own account and operating it either on his own or entrusting a master appointed by him with the operation, Section 510 (1) HGB.¹⁹

The essential criterion to define a „charterer by demise“ is to identify if the charterer has the full responsibility for the vessel's navigation. German Courts have taken a very narrow interpretation, which is, that the master must be dependant on the charterer to the exclusion of all others and be subject to the charterer's authority to instruct him. Charter parties where the ship owner reserves himself the right to issue instructions concerning the navigation to the master do not fall under Section 510 HGB. That would be the case with certain time charter parties that include an employment clause (e.g. Baltime or Deutzeit charterparties), that do not delegate full authority to the charterer to instruct the master.²⁰

¹⁸ Looks, Maritime Law Handbook, I-3.

¹⁹ HansOLG, VersR 1978, p. 560 („Merweborg vs. Finnrose“).

²⁰ Looks, *ibid.*, I-7.

The Charterer is treated like an operator with all rights and duties but with someone else's vessel in relation to third parties.

Section 760 (2) HGB states, that claims of creditors may be enforced against the demise charterer or the operator during a demise charter and that a judgement against the demise charterer would be binding upon the operator.

According to Section 771 ZPO the operator may not as under Section 510 (2) HGB intervene in an arrest procedure as long as there is a justified maritime lien for the claim.²¹ The following claims qualify as maritime claims under Section 754 (1) HGB:

- Claims of the master and of the crew for their wages
- Public shipping and harbour dues as well as pilotage fees
- Claims for damages for loss of lives or personal injury and for loss and/or damage to property to the extent that such claims have arisen from the operation of the vessel, but excluding claims for loss and/or damage to property which are or may be based on contract
- Salvage claims; general average contribution of ship and freight; claims arising out of a wreck removal
- Claims of the social security insurance as well as of the unemployment insurance against the owner.

The list shows that merely contractual claims cannot lead to an arrest.

After the demise charter has ended, the action must be brought against the new demise charterer or the operator.

Therefore a claim is secured by the operator's vessel in cases where the demise charterer is liable for his own fault, because in this case an operator would be liable with his vessel.

A bareboat charter having full power of disposal according to Section 510 HGB is treated like an operator as well.

²¹ RG, RGZ 62, p. 373.

However the operator will be released from the liability if he can prove that the demise charter used the vessel in an unlawful way (e.g. gross deviation) or that the creditor is in claiming in lack of good faith.

However the Hamburg Court of Appeal has ruled otherwise in two cases which were rejected by the legal literature and the court is supposed to overrule these decisions.²²

If a claim against a demise charterer is not based on a maritime lien according to Section 754 HGB or if a claim is directed against a time charterer, it is not possible to arrest the vessel, because an arrest may not affect the property of the owner. But if the property of the charterer includes the e.g. the ship's stores and fuels, these may usually be attached by way of arrest, if they are not urgently required for the ship.

The above statements relate primarily to the arrest of national vessels. If foreign vessels are concerned, it must be clarified if it flies the flag of a state that is a party to the 1952 Convention or not.

If the vessel flies the flag of a contracting state, not every claim against the owner or the demise charterer may lead to an arrest. The claim would have to be a „maritime claim“ in terms of Article 1 (1) (a) to (o) of the 1952 Convention.

But as Article 6 (2) of the 1952 Convention states, the procedural preconditions for an arrest stay subject to national law.

6.5. Reason to Arrest

Generally, under German law the assets of a debtor can be attached for the purpose of satisfying claims only when the creditor has obtained a legal title, e.g.

²² Looks, *ibid.*

- an enforceable judgement or an arbitration award declared enforceable by a court
- an amicable settlement concluded and protocolled before the court
- a deed drawn up by a notary public in which the debtor accepts that the creditor has a monetary claim against him and that the deed is the enforceable title without the necessity of taking further legal action.

The arrest is an exception to this rule as it allows the attachment before the stage of enforceability of the claim for conservatory purposes only, namely when:

- no judgement or arbitration award has been rendered yet
- an arbitration award has been rendered but not yet declared enforceable by a court
- a judgement has been rendered which is not yet final and only enforceable upon the provision of security.²³

Section 917 ZPO requires the claimant to substantiate by *prima facie* evidence a reason for the arrest. This is one of the most critical points during an arrest procedure.

Section 917 ZPO reads as follows:

(1) The arrest of assets is allowed if there is a risk that without granting the arrest the enforcement of a judgement is rendered impossible or substantially more difficult.

(2) It is considered to be a sufficient ground for an arrest, if the judgement would have to be enforced abroad and reciprocity is not guaranteed.

²³ Brüggenmann, Eurotrans 2000-III, p. 3.

The ground for an arrest by virtue of Section 917 (1) ZPO is the general rule and provides that the arrest is possible if there is a risk that the future enforcement of a judgement would be rendered impossible or substantially more difficult.

Two conditions have to be fulfilled²⁴:

- Firstly there must be a „judgement“ the enforcement of which is a risk. Both paragraphs of Section 917 ZPO refer to the term „judgement“. The meaning of „judgement“, however, is not automatically identical in both paragraphs. Here, in paragraph (1) „judgement“ means:
 - a German judgement not yet binding and/or enforceable without providing security
 - a German arbitration award not yet declared enforceable by a German court
 - a foreign judgement which can be enforced in Germany
 - a foreign arbitration award that can be enforced in Germany.
- Secondly there must be a risk that without granting the arrest, the enforcement of such a judgement is rendered impossible or substantially more difficult.

It is not easy to meet these requirements to prove a good reason for an arrest.

To prove the fact that the debtor is in general financial troubles (but not in insolvency yet) is e.g. not sufficient, because the purpose for an arrest is

²⁴ Brüggenmann, *ibid.*

not to favour some creditors over others.²⁵ The applicant must prove special circumstances that justify an arrest in that special case.

The jurisdiction developed a large *causaistica* for the grounds of arrest by virtue. The Enforcement of a judgement is e.g. at risk if the vessel in question which is registered abroad and going to sail abroad would be the only asset of a „single ship company“.²⁶

But since the courts interpret the requirements in a strict way, the application for an arrest will be dismissed if the operator runs a regular scheduled service calling at a German port.²⁷ A ship is supposed to be regular scheduled if it calls with a frequency of about one vessel every one or two months at a German port.

In the case of the *Ethiopian Shipping Lines*²⁸ e.g. the Higher Regional Court of Hamburg denied the reason for an arrest because the applicants' claim was secured by sufficient assets of the defendant in Germany, because the defendant distributed arrived cargo to its agent in Hamburg according to Sections 675 and 667 HGB. Nearly every month a vessel of the defendant called at the port of Hamburg with proceeds paid to the agent of about 125.000\$ each. An execution against the defendant's assets was supposed to be possible for the applicant in order to satisfy his claims within relatively short time. A discontinuance of the traffic from Ethiopia to Germany was not to be feared with regard to the action for the recovery of 90.000 DM, neither was to be feared that the defendant was would change its contracts of carriage to freight payable at the place of discharge, e.g. in Ethiopian currency instead of US-\$. In the courts' opinion the liner service was unimportant anyway, because the applicant was supposed to be able to satisfy his claims through the agent in Hamburg.

²⁵ Herber, *Seehandelsrecht*, Berlin/New York 1999, p. 120.

²⁶ Herber, *ibid.*, p. 121.

²⁷ OLG Hamburg, *VersR* 1982, p. 341 (*Ethiopian Shipping Line*).

²⁸ OLG Hamburg, *ibid.*; *VersR* 1997, p. 124; Herber, *ibid.*

In another case, the one of the *Indonesian State Shipping Line*²⁹, the applicant, a Panamanian operator, applied with regard to a claim of 290.000 DM and a lump sum of 58.000 DM for a warrant of arrest into the domestic assets of the Indonesian State Shipping Line. Further the claim of arrest arose from the carriage of goods to the amount of 338.000 DM of the defendant against the company T., domiciled in Hamburg, which was the third party debtor.

The Regional Court of Hamburg issued a warrant of arrest and affirmed the order with a judgement. The Appeal at the Higher Regional Court of Hamburg was successful and lifted the warrant of arrest and changed the judgement.

The statutory declaration according to Section 294 (1) ZPO of the holder of a special statutory authority (according to Sections 48-53 HGB), Mr R., confirmed the existence of a branch for Europe in Hamburg, a regular scheduled traffic of two ships per month minimum calling the port of Hamburg and the existence of an account at the domestic bank B., with an average fluctuation of an amount of about 1.5 Million DM from charter hire and freights.

The court considered this statutory declaration as a substantiating reason in favour of the Indonesian operator.

In the case of the Liberian tanker *M.S. Afran Zenith*³⁰, the vessel ran aground at the port of Hamburg in 1981. From the leakage about 300 to 400 tons of crude oil spoiled the water of the river Elbe and its banks. The authorities had to order private companies to undertake preventive measures. The costs went beyond the amount of 1 Million DM. In order to secure costs for this damage a warrant of arrest was finally issued into the assets of the operator and into the vessel itself. The place of business, both of the operator, a Liberian company, and of the P&I Club, located in England, constituted the requirements of the old version of Section 917 (2) ZPO. Furthermore, the court considered the limited liability of the

²⁹ OLG Hamburg, VersR 1971, p. 124 (Indonesian Shipping Line).

³⁰ Kusch, „Der rechtliche Hintergrund zum Arrestfall Afran Zenith“, Hansa 1981, p. 1292.

insurance according to Article 7 (8) in connection with Article 7 (1) and Article 5 (1) as well as Article 10 of the 1984 International Convention on Civil Liability for Oil Pollution Damage as „imminent risk“ in terms of Section 917 (1) ZPO.

In the meantime a liner service with the vessel in question has been doubted. A security of the return of the tanker could not be guaranteed and with regard to the claim of reimbursement of costs, it is uncertain if the tanker would come back for judicial execution.

In the case of the *M.S. Paracas*³¹, the defendant operator of the vessel had been sued for damages in the total amount of 62.918,13 DM plus a lump sum amount of 3.400 DM. Two lots of the carried fish meal from Peru to Hamburg in March 1972 had been damaged and finally compensated by the plaintiff's cargo insurer. The Regional Court of Hamburg issued a warrant of arrest.

The defendant lodged an objection and claimed a lack of a reason of arrest. At the same time he claimed that in case of a compliant judgement, judicial execution would not be necessary abroad. He explained further that he runs liner traffic with two ships, namely *M.S. Paracas* and *M.S. Alisios*, constantly calling at European ports, inter alia at the ports of Bremen and Hamburg. The plaintiff claimed however, that the defendant did not run liner traffic, but that he only irregularly called at German ports. However, the Regional Court of Hamburg confirmed its judgement and the Higher Regional Court refused appeal. The court considered the risking of a future domestic execution of a personal money claim against the defendant as decisive.

The defendant was not able to prove the security of such a future execution since he had not assets in Germany. Furthermore, the courts saw the age of the shipping fleet of the defendant with an average of 30 years, as excessive. The court considered this as an indication that the ships might be suspended from traffic in the near future, e.g. because of profitability calculations, which could prevent their return to German ports.

³¹ OLG Bremen, VersR 1972, p. 250.

According to the courts, it was beyond the scope for judgement evaluation, if there existed capacity and even the wish to replace the ships by new ones. The court also mentioned the political situation of the home port (Callao/Peru), where the transfer from private to state ownership in the years from 1968 to 1971 had been recognised as a factor of uncertainty.

Acts and preparations of war were also considered as an influencing factor for the frequency of maritime traffic and as an indicator for a possible discontinuance of ships from the place of war, hence a reason to arrest.³² Another controversial is, if a ship under construction is to be regarded as a vessel under this definition. Some legal writers regard a ship as a „vessel“ as soon as it has been launched, but most share the opinion that one could speak of a „vessel“ only after its completion.³³

As shown above the burden to proof a reason for an arrest is difficult to take.

However, Section 917 (2) ZPO may ease that burden by a statutory presumption in favour of the creditor in certain cases. The enforcement of a judgement in a country lacking reciprocity is considered as a sufficient reason for an arrest.

Section 917 (2) ZPO went to several changes during the last decade.

Until 1998 Section 917 (2) ZPO stated, that there was a ground for seizure if the judgement on the main issue was to be enforced.

However already for a long time some legal writers and also some courts challenged that view and because they were of the opinion that an arrest was also possible if not a German court but another EU-court had jurisdiction on the merits.

A further dispute arose as to the meaning of "abroad", i.e. whether such a EU-judgement could be secured by an arrest under section 917 (2) ZPO if

³² AG Hamburg, VersR 1987, p. 1236.
³³ Brüggenmann, *ibid.*; Looks, *ibid.*

it is enforceable outside Germany (but within another EU-member-state) or only outside the EU.³⁴

Part of the dispute was decided when the Higher Regional Court of Hamburg³⁵ had in 1993 by order referred to the European Court of Justice for a preliminary ruling under Article 177 (3) of the EC Treaty the question of whether this ground for seizure was satisfied if the seizure order is to be enforced in a country which has acceded to the Brussels Convention 1968³⁶. The OLG Hamburg had thus sought a binding interpretation of Section 917 (2) ZPO. However, pursuant to Article 177 (1) of the EC Treaty, the subject matter of the preliminary ruling can only consist of questions concerning the interpretation of the EC Treaty and the validity of acts of the Community, not questions of national law. However, the ECJ did not consider the question referred to it to be inadmissible, but effectively reformulated it to ask whether Article 7 of the EC Treaty, read in conjunction with Article 200 thereof and the Brussels Convention, precludes a national provision of civil procedure law which, in the case of a judgement to be enforced within national territory, authorises seizure only on the ground that enforcement would otherwise probably be made impossible or substantially more difficult, whereas, in the case of a judgement to be enforced in another Member State authorises simply on the ground that enforcement is to take place abroad.³⁷

In Section 917 (2) of the former version of ZPO, the ECJ saw a violation of the prohibition of discriminatory practices. This put an end to the dispute about the sphere of application of the said Section, at least in relation to the Member states of the ECJC, since European law as supranational law takes precedence over national law, and is directly effective vis-à-vis the citizens of the Member States. The newly introduced Section 917 (2) ZPO took account of this decision.³⁸

³⁴ Brüggenmann, *ibid.*, p. 5.

³⁵ OLG Hamburg, *EuZW* 1993, p. 264.

³⁶ EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of in Civil and Commercial Matters (ECJC).

³⁷ Case C-398-92 (firm of Mund & Fester ./ firm of Hatrex International Transport), ECJ, judgement of 10 February 1994.

³⁸ BGBl. I 1998, p. 2030.

Accordingly, the special ground for seizure Section 917 (2) ZPO no longer applied, with effect from 1 October 1998, in the sphere of application of the ECJC and the Lugano Convention (EU and EFTA states).³⁹

By Article 4 of the German law implementing provisions of Community law pertaining to the cross-border taking of evidence in civil and commercial matters in the Member States (*EG-Beweisaufnahmedurchführungsgesetz*)⁴⁰, the legislator has further restricted the ground for seizure that enforcement is to take place abroad. Section 917 (2) ZPO was amended with effect from 1 April 2004. It provides as follows: "*The fact that judgement is to be enforced abroad and reciprocity is not guaranteed shall be considered sufficient grounds for a seizure order*". Therefore, a ground for seizure according to the said section is now only the imminent enforcement abroad in a state with which reciprocity is not guaranteed. By establishing a connection to the general criterion of reciprocity (section 328 (1) 5 ZPO), the legislator's conception was:

*to take account of the improvements having occurred in the field of recognition and enforcement of foreign judgements and at the same time to reduce the ground for seizure that enforcement is to take place abroad to a level acceptable today.*⁴¹

Hence, the privileged ground for seizure still applies only in relation to states in which "reciprocity" is not guaranteed, therefore in relation to so-called "third states".⁴²

There had been a huge dispute over the definition of "judgement" in Section 917 (2) ZPO. Until the last alteration of the said section, the

³⁹ Looks, 12 JIML 2006, p.420 f.

⁴⁰ BGBl. I 2003, p. 2166.

⁴¹ BT-Drucksache 15/1062S8 on Section 917 (2) ZPO.

⁴² Looks, *ibid.*, p. 421.

prevailing opinion was that only German titles, i.e. judgements or arbitration awards, were protected by Section 917 (2) ZPO.⁴³

According to the old opinion, e.g. if ship owners and charterers of a vessel agreed to submit disputes to London arbitration, which often occurs in the law of chartering, the charterer asserting a claim against the ship owner could not, according to the former prevailing view, claim for himself the ground for seizure of Section 917 (2) ZPO, since a national enforceable judgement on the main issue could not be obtained.⁴⁴

Since the alteration of the section, the prevailing opinion changed and now shares the opinion that Section 917 (2) ZPO focuses only on the reciprocity of the enforcement of a judgement.⁴⁵

Therefore Section 917 (2) ZPO is also applicable for judgements and arbitration awards from ECJC and Lugano member states which have to be enforced in a third country.⁴⁶ Some legal writers even share the opinion that any title from a third country is sufficient if it would have to be enforced in a country lacking reciprocity.⁴⁷

The exclusive focus of Section 917 (2) ZPO on the reciprocity is problematic because it is difficult to determine if there is „reciprocity“ in the enforcement of a judgement in relation to a certain country or not. Even if there are bilateral or multilateral agreements, the legal system of another state might be less effective or less likely to enforce a foreign judgement. Some commentaries include a list of countries, which show if there is reciprocity with a certain state, or not. Even in relation to the USA the majority states that there is no reciprocity for an amount in dispute of less than \$ 100.000.⁴⁸

⁴³ OLG Hamburg TranspR 1990, p. 112; Mankowski, RIW 1991, p. 181; Rabe, Seehandelsrecht, 10th edition, Munich 2000, p. 47; Kienzle, *ibid.*, p. 72 ff; Herber, *ibid.*, p. 121

⁴⁴ Looks, *ibid.*, p. 421.

⁴⁵ Baumbach/Lauterbach/Albers/Hartmann, ZPO, Section 917, marginal note 17; Musielak, Kommentar zur Zivilprozessordnung, section 917, marginal note 7; Looks, *ibid.*

⁴⁶ Musielak, *ibid.*

⁴⁷ Baumbach/Lauterbach/Albers/Hartmann, *ibid.*; Mankowski, RIW 2004, p. 590; Looks, *ibid.*

⁴⁸ Zöller/Geimer, 25. Aufl. 2005, appendix IV.

Anyhow an arrest would not be granted if the debtor has sufficient domestic assets (see examples above concerning liner services, etc.) even if the requirements of Section 917 (2) ZPO are met.

6.6. Primacy of the Arrest Convention

As already mentioned Germany is a party to the 1952 Arrest Convention. Therefore the 1952 Convention applies apart from the ZPO if the vessel to be arrested flies the flag of a contracting state or if the creditor comes from a contracting state party. As mentioned the 1952 Convention only permits an arrest on account of certain maritime claims and not like the ZPO on any money claim.

Since the list of maritime claims in the 1952 Convention is very long and the requirements for an arrest under the ZPO are quite hard to take, there has never been a problem in arresting a vessel in Germany. That might have changed since the Federal Supreme Court ruled that a "national link" is required for the application of Section 23 ZPO and therefore the reason for arrest in Section 917 (2) became more important.

A close examination of the rules of the 1952 Convention will show that the application of said Section 917 (2) ZPO is not applicable concerning the arrest of a vessel. Hence the 1952 Convention contains the exclusive rules for the arrest of vessels.

Article 6 (2) of the 1952 Convention reads as follows:

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

The majority of legal writers so far understand this rule in the way, that in Germany the requirements for an arrest of the ZPO have to be met and

that the rules of the 1952 Convention merely apply "on top".⁴⁹ The 1952 Convention is supposed to act as an "additional filter". Neither less the prevailing opinion, the term "arrest" is very well defined in Article 1 (2) of the 1952 Convention. Thus, "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

Contrary to Section 916 (1) ZPO "arrest" is defined ship-specific. Otherwise there aren't any big differences between the two regulations.

Thus there is a basic provision whether a ground for granting a warrant of arrest is required or not.⁵⁰

As the 1952 Convention itself contains a provision on the need for a ground of arrest, namely the substantiation of a maritime claim included in the list of claims of article 1 (1), no recourse can be taken to national law.⁵¹ Even if the wording of the 1952 Convention is a little "awkward" (as seen above), it neither less contains some procedural rules that differ from those of the ZPO. Article 7 (2) of the 1952 Convention for instance requires the court to fix a time limit within which an applicant must bring an action on the main issue before the court that has jurisdiction. In the relevant Section of the ZPO, 926 (1), one party would have to apply for such a time limit at the court. Under the ZPO such a time limit will not be set automatically by the court. The prevailing opinion also overlooks by referring to the application of the German rules of procedure according to article 6 (2) of the 1952 Convention, that Section 917 (2) ZPO is actually not a rule of procedure, but a substantive rule.⁵² The application for a warrant of arrest would be dismissed as being unfounded, not as being inadmissible, by a German court, if it was lacking a ground for an arrest.

In addition to that it is also to mention that the aim of Article 7 (2) and (3) of the 1952 Convention is to secure the enforcement of any enforceable judgement on the issue (judgement or arbitration award) whether the comes from a court or arbitration tribunal in the country of the respective

⁴⁹ Nieschulz, *Der Arrest in Seeschiffe*, p. 42; Herber, *ibid.*, p. 119.

⁵⁰ Kienzle, *Festschrift für Herber*, p. 77.

⁵¹ Kienzle, *ibid.*, p. 79; Looks, *ibid.*, p. 423.

⁵² Kienzle, *ibid.*; Looks, *ibid.*

competent court or tribunal for the arrest proceedings or from a court or tribunal from another country.⁵³ Thus the mobility of the enforcement object itself is the ground for an arrest under the 1952 Convention and therefore no recourse can be made to Section 917 (2) ZPO. Besides that the 1952 Convention as an international treaty takes precedence over the German national law and thus Section 917 (2) ZPO is not applicable concerning an arrest of a sea-going vessel.

To summarize, the 1952 Convention aims on the restriction of the seizure of vessels by way of security to ensure the movement of shipping as free as possible. That happens through the restriction of seizure to certain maritime claims as well as in that the provision of adequate security in one contracting state prevents seizure in any other contracting state.

As sole prerequisite Article 2 (1) of the 1952 Convention requires the vessel to be arrested to be „in the jurisdiction of any on the Contracting States“. Even if the vessel to be arrested is ready to sail/depart, an arrest under the 1952 Convention will be possible contrary to Section 482 ZPO.⁵⁴ But since the 1952 Convention, as international treaty, takes precedence over the German national law, that difference is not important.

Consequently, the prerequisites of the arrest of vessels are definitively regulated in the 1952 Convention.⁵⁵

6.7. Definition of „Vessel“

Since there is no binding legal definition of the term „vessel“, legal writers and courts developed specific criteria over the time. The following definition is the most adopted: „a vessel is a hollow body capable of

⁵³ Kienzle, *ibid.*, p. 79.

⁵⁴ Looks, *ibid.*, p. 423.

⁵⁵ Looks, *ibid.*, p. 424; Kienzle, *ibid.*, p. 79.

flotation and of sizeable dimensions, able and designed to be moved in and/or under water and to carry passengers and cargo“.⁵⁶

The following key criteria are of importance:

- It must be a hollow body capable of flotation. Other objects, e.g. rafts not consisting of hollow bodies, do not satisfy these requirements.
- The hollow body must be of sizeable dimensions. No exact limits are set. It is generally assumed that rowing boats or small sailing boats are not regarded as vessels.
- Furthermore, the hollow body must be able and designed to move or be moved in and/or under water. It is irrelevant whether or not such movement is through self-propulsion. Thus lighters, barges, floating cranes, dredgers and lightships are to be regarded as vessels within the meaning of the above definition. To what extent drilling platforms are to be regarded as vessels is a controversial issue. As long as they are transportable and merely anchored, they are regarded as vessels.
- The hollow body must move exclusively in water. Consequently hovercrafts are not vessels.
- Lastly the body must be able and designed to carry persons or cargo. This is why buoys or other floating nautical marks are not vessels.⁵⁷

Another controversial is, if a ship under construction is to be regarded as a vessel under this definition. Some legal writers regard a ship as a „vessel“ as soon as it has been launched, but most share the opinion that one could speak of a „vessel“ only after its completion.⁵⁸

⁵⁶ Brüggenmann, Eurotrans 2000-III, p. 6; Looks, *ibid* I-4.

⁵⁷ Brüggenmann, *ibid.*; Looks, *ibid.*

⁵⁸ Brüggenmann, *ibid.*; Looks, *ibid.*

6.8. Sister Ships

Overall under German law all assets of a debtor may be arrested in order to protect a claim for money against that debtor. If the debtor owns more than one ship, any of these may be arrested.

But it is important to keep in mind, that under German law legal persons (companies, etc.) and the natural persons behind them are treated as having different legal personalities. Therefore if the claim is directed against a legal person (e.g. a limited) it is just in very exceptional cases possible to sue the natural person behind.

Therefore it is not sufficient that as in Article 3 (2) of the 1952 Convention, a ship shall be deemed in the same ownership when all shares therein are owned by the same person.⁵⁹ The possibilities of piercing the so-called corporate veil of a company registered in Germany in order to identify „true“ ownership and liability are very restricted, e.g.

- in certain cases, a shareholder is liable for debts of the company, if he did not provide adequate capital in his company
- the mother company is liable for the debts of one of its subsidiary companies if both companies are linked by an express or facet controlling agreement according to which the income of the subsidiary company is to be transferred to the mother company.⁶⁰

6.9. Procedures of Arrest

6.9.1. Form of the Arrest Application

The application is usually made in writing, but may also be made orally by having it written down by the registry of the arresting court.

⁵⁹ Brüggenmann, *ibid.*, p. 7.
⁶⁰ Brüggenmann, *ibid.*

The arrest claim and the ground must be substantiated. These must be supported by *prima facie* evidence. There are certain sorts of evidence that are permitted in the German procedural law, e.g. documents, witnesses, expert opinions, affirmations in lieu of oath.

Generally it is not required to specify the property to be arrested since the arrest will effect the debtors' property at all, but in the case of a vessel, particulars (name, etc.) must be given if the applicant wants a special vessel to be arrested, especially if it is only the presence of a foreign vessel in the area of jurisdiction of the arresting court which provides the basis of the jurisdiction of that court. The applicant must affirm the correctness of the details.

6.9.2. Security by the Arresting Party

As stated in Section 921 ZPO, the court may require the applicant to put up security. This will be very likely in cases where the claim or ground for the arrest is proven entirely to the satisfaction of the court. But even if the court is satisfied by the assertion of the applicant it may require him to put up security. The amount of security to put up will be in relation to the loss that might occur to the debtor if the arrest would be wrongful.

The security might be paid in cash to the court, but most commonly the applicant will provide the court with an irrevocable and unconditional bank guarantee by a bank with a good reputation.

6.9.3. Representation by Counsel; Power of Attorney

The creditor must not be represented by a lawyer to hand the application to the court.

However in the case, that the defendant challenges the arrest, both parties have to be represented by lawyers before the court.

The lawyers usually proof their authority by a written and signed authorization of the client, but they also may proof it otherwise to the courts' discretion.

The application must not be handed in personally to the court. It is sufficient to send it to the court by mail or telefax.

6.9.4. Court Hearing

Commonly an arrest order is granted ex parte, however it is in the court's discretion whether to fix an oral hearing or not. An oral hearing will usually just take place if the application for the arrest fails to convince the court sufficiently.

6.9.5. Security by the Defendant

When the warrant of arrest is issued, the arrest order must also state the amount of security that must be provided by the defendant in order to have the arrest lifted. If the security must be provided cash, by bank guarantee or in a different kind, e.g. as a letter of undertaking to be provided by P&I Club or Hull insurer, is in the discretion of the court.

The amount of security is also in the discretion of the court, but it shall not exceed the value of the vessel as it only substitutes for the vessel. Usually it will be equal to the loss that might occur to the applicant if the arrest was lifted plus costs.

As a rule the creditor shall not be put in a better position than he would have been if the vessel had remained under arrest.

In addition to the general rules outlined above, Sections 8 (4) and 35 of the Maritime Creditors' Distribution Law apply if the ship owner's liability is limited. These provisions stipulate that if a vessel is arrested in respect of a claim where the owners, charterer, pilot or crew are entitled to limit their liability, the vessel must be released as soon as security has been provided up to the limit of liability. Under Article 11 et seq. of the London Convention of 1976 concerning the limitation of liability for Maritime

Claims, which has been ratified by the Federal Republic of Germany, it is sufficient for security at the maximum amount of liability to be deposited in one of the states, which is a contracting party to the Convention. It is a requirement, though, that such an amount must be actually available to the creditor. Evidence must be given that there is no obstacle to payment, such as might arise, for example, from exchange control regulations.⁶¹

6.9.6. Costs of the Courts Proceedings

The costs for the arrest proceedings will be determined by the amount in dispute. The lawyer's will be paid a scale fee that also depends on the amount in dispute.

Furthermore there will be costs for the bailiff and cost for guarding the vessel that will usually have to be paid in advance.

6.9.7. Execution of the Arrest Order

The arrest order will be executed at the request of the arrest applicant by the competent bailiff who takes position of the vessel. The bailiff usually makes the possession known by attaching a chain complete with lock and seal to the helm on the bridge of the vessel. The bailiff also arranges to guard the ship, informs the port authorities and the consular representation of the flag state if it is a foreign vessel.

The execution of the arrest order must take place one month from its date of issue. It may be executed prior to its service on the defendant.

However, the arrest order must be served to the defendant not later than one week after its execution, otherwise the defendant is entitled to ask to have the arrest set aside.

The required method of service an order of arrest depends on the way the order was granted. If the order was granted *ex parte*, the applicant must take care of the order to be serviced (usually through a bailiff or through diplomatic channels if the defendant is domiciled abroad).

⁶¹ Looks, Maritime Law Handbook, p. 9.

If the arrest order was issued by a judgement of the court, it will be served ex officio.

The master of the vessel to be arrested is only entitled to accept service if the underlying claim attracts a maritime lien listed in Section 754 (1) HGB.⁶²

If the applicant hands in a well-founded arrest application to the court, a warrant for arrest can usually be obtained within a few hours. The most important courts for ship arrests, in Hamburg and Bremen, run an emergency service at the weekends.

The execution of the arrest order by a bailiff usually also happens within a short time.

6.9.8. Appeal by the Defendant

There are various possibilities for the defendant to challenge a warrant of arrest:

- If the arrest order was granted ex parte, the defendant may file an objection against the validity of the arrest to the court of arrest. The court is then forced to fix an oral hearing of the parties and to give a judgement. The judgement may also be subject of an appeal that has to be lodged within one month.
- if the warrant of arrest was granted by judgement of the court after oral hearing, the loosing party might appeal as stated above.
- As a further remedy the defendant may ask the court to set a time limit for the applicant to bring in an action on the main issue within a certain period. If the applicant fails to do so, the warrant of arrest must be set aside.

⁶² Brüggenmann, *ibid.*, p. 12; Looks, *ibid.*, p. 11.

- The defendant may also apply to the court to set aside the arrest in certain cases, e.g. if the arrest claim has ceased or sufficient security has been put up.

6.9.9. Auction Sale in the Arrest Proceedings & Priority of Claims

Section 930 (3) ZPO states the court, upon application, may order the auction of the arrested vessel, if there is a risk of a considerable deduction of value of the ship or if the costs of the custody are disproportionately high compared to the value of the ship. The decision to order an auction is entirely in the discretion of the court. Anyhow, traditionally German courts are very reluctant to order an auction sale in arrest proceedings.

Once a vessel was sold in an auction, the sale proceeds will be placed on deposit and distributed after a judgement on the main issue was felt.

The execution of the arrest constitutes a statutory lien on a foreign ship and an encumbrance over a ship registered in a German ships registry. Several arrest liens rank in accordance with the time in which the arrests were executed. An arrest lien does not rank prior to existing maritime liens or mortgages in favour of other claimants. Auction sale proceeds are distributed as follows:

1st rank:	Cost of the arrest procedure, the maintenance of the ship and the cost of the auction sale.
2nd rank:	Maritime liens
3rd rank:	Mortgages
4th rank:	Arrest liens which are not based on a maritime lien or mortgage

5th rank: Any other unsecured claims.⁶³

6.10. Inadmissible Arrest

Section 945 ZPO entitles the defendant to claim damages against the applicant if the arrest was inadmissible from the beginning and has been set aside. There is no fault required on the part of the applicant. The claim for damages covers all losses suffered by the defendant due to the arrest, including loss of profit. The payable amount will be reduced if the conduct of the defendant contributed to his losses.

⁶³ Brüggenmann, *ibid.*, p. 14.

7. Arrest of ships in South Africa

7.1.Sources of National Law & Applicable International Conventions

South Africa's legal tradition is different from the German one. It is a mixed legal system that has been influenced over the time by both, common and civil law. Tetley describes it as a mixed jurisdiction with a legal tradition which partly derives from Roman Dutch law and partly from English law.⁶⁴ Therefore the main sources of law in South Africa are statute and case law.

Like English law, South African law is commonly not codified. There are some statutes, like Acts and Rules, but most of the law is prescribed in the judgements of the courts.

In maritime matters the relevant courts are the Provincial and Local Divisions of the High Court or the Appellate Division of the Supreme Court. The latest exercises a separate admiralty jurisdiction in relation to any "maritime claim".⁶⁵

The arrest of vessels is governed by the "Admiralty Jurisdiction Regulations Act No. 105 of 1983"⁶⁶ as amended by the Admiralty Jurisdiction Regulation Act No. 87 of 1992 and the "Rules Regulating the Conduct of the Admiralty Proceedings of the several Provincial and Local Divisions or the Appellate Division of the Supreme Court of South Africa No. 571 of 1986 as amended 1996"⁶⁷.

South Africa is neither a party to the 1952 or 1999 Convention nor to the 1926 Brussels Convention Relating to the Immunity of State-Owned Vessels.

⁶⁴ Tetley, William, "Mixed Jurisdictions: Common Law vs Civil Law (Codified and uncoded)", (2000) 60 Louisiana Law Review, p. 677/692.

⁶⁵ Hare, John, Shipping Law and Admiralty Jurisdiction in South Africa, Juta 1999, p. 44.

⁶⁶ Thereafter referred to as "The Act".

⁶⁷ Thereafter referred to as "The Rules".

7.2. Jurisdiction of the Courts & Form of Proceedings

The admiralty jurisdiction in South Africa is also governed by the Act.

Section 2 of the Act states the following:

(1) Subject to the provisions of this Act each provincial or local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

(2) For the purpose of this act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

There are the coastal divisions of the Cape Provincial Division, which has its seat in Cape Town, the Eastern Cape Local Division, which has its seat in Port Elizabeth, the Eastern Cape Division, which has its seat in Grahamstown and the Durban and Coast Local Division which has its seat in Durban. Appellate jurisdiction is vested in the “full bench” (three professional judges) of those divisions and in the Supreme Court of Appeal.⁶⁸

The High Court of South Africa may also exercise a separate admiralty jurisdiction. Its procedure is however governed by separate rules.

The jurisdiction of the courts includes also the territorial water (that extends up to 12 nautical miles within the sea) in their area of jurisdiction.

The main features of the enforcement of a maritime claim are therefore the following:

⁶⁸ Charnock, Graham Niven, Arrest of Vessels in South Africa, Maritime Law Handbook, Suppl. 25 (2005), p. I-1.

- The claim to be enforced must be a “maritime claim”, Section 1 (1) of the Act.
- The competent court must be called.

The Act provides mainly for three forms of proceedings: Actions *in rem*, actions *in personam* and security arrests.

7.2.1. Actions *in personam*, Section 3 (2) of the Act

An action *in personam* is one, in which the person or the debtor or “wrongdoer” is cited as the defendant. The action is therefore brought against the person. The “person” must of course not be a natural person, it may also be a juristic person.

The critical point in enforcing an action *in personam* is, that it may just be instituted against the following types of person listed in Section 3 (2) of the Act:

- a person resident or carrying on business at any place in the republic,
- a person whose property within the court’s area of jurisdiction has been attached by the plaintiff or applicant, to found or to confirm jurisdiction,
- a person who has consented or submitted to the jurisdiction of the court,
- a person in respect of whom any court in the Republic had jurisdiction in terms of the Short Term Insurance Act 1943 (which has been replaced by the Short Term Insurance Act 1998). This contains e.g. foreign insurance companies (Lloyd’s etc.).
- Juristic persons which are a company, if the company has a registered office in South Africa.

The Subsections are not accumulative, they are alternative.⁶⁹

There are two possible forms of proceedings.

In the cases of Subsections (a), (c) and (e), where the prospective defendant is resident or carrying on business in South Africa, it is generally neither necessary nor possible to attach his property in order to found jurisdiction.⁷⁰ In these cases the court already has jurisdiction over the person.

In these cases the applicant needs to issue and serve a summons. The date of service of the summons will automatically be the date on which the action is officially commenced.

On the other hand, if the other party is a foreigner that has not consented or submitted to the jurisdiction of the South African court, it will usually be necessary to attach property (no matter of the value of the property to be attached matches the amount in dispute) of that person. The property attached within the area of jurisdiction of the perspective court founds or confirms jurisdiction of the South African court.

In order to attach property of another person certain averments have to be made before a judge.

The essential averments in an application to attach property would be:

On the *prima facie* standard of proof:

- that the applicant has a *prima facie* case on the merits of the underlying claim in respect of which the attachment is sought, based upon facts which if proved would give rise to that cause of action;

and further, on a balance of probability:

- that the claim is a maritime claim as defined by the Act and that the court has jurisdiction, or will have jurisdiction upon attachment;
- that the defendant is a category of person described in Section 3 (2) (a-e) of the Act;

⁶⁹ Hare, Draft of Chapter 2, p. 13.

⁷⁰ Hare, *ibid.*; Charnock, *ibid.*, Pike, Andrew, Associated Ship Arrests in South Africa, Session 3, p. 208.

- that the property to be attached is owned by the defendant and that it is situated in or likely to come within the jurisdiction as contemplated by Section 4 (4) (b) of the Act; and
- that the applicant has no security, or insufficient security and a genuine and reasonable need for security for its claim.⁷¹

Once the application is made the attachment must be effected within 12 months, otherwise it will become invalid (if the period has not been extended by the court).

A Writ of Attachment will be served by the court for this reason upon the property to be attached. Also an order regarding the service of the writ of the summons will be issued by the court. If the defendant is a foreigner, summons may only be served outside the jurisdiction of the court with the leave of the court.⁷²

One notable point is that even if the South African admiralty law has highly been influenced by English law, the “attachment” procedure of marine property got “lost” in England during the 18th Century, but has been applied in South Africa for the whole time.⁷³ As late as in 1975 the English High Court of Appeal introduced a similar institute, the so-called *Mareva Injunction*.⁷⁴

7.2.2. Actions *in rem*, Section 3 (4 & 5) of the Act

A maritime claim may be enforced by an action *in rem* if

- the claimant has a maritime lien over the property to be arrested.

As in English law, South Africa only recognizes a limited list of maritime liens, which provide the claimant with the right to arrest

⁷¹ Hare, *ibid.*, p. 15.

⁷² Hare, *ibid.*, p. 16.

⁷³ Tetley, William, „Arrest, Attachment and Related Maritime Law Procedures“, Tulane Law Review 1999, p. 1948.

⁷⁴ Tetley, *ibid.*

maritime property without the liability of the owner thereof.⁷⁵ Claims that will give rise to a maritime lien are merely restricted to salvage, damage caused by a ship, seamen's wages, master's wages, master's disbursements and bottomry and *respondentia* (foreign maritime liens that do not fall under one of these categories are not recognized by South African law so far).⁷⁶

The most important point concerning a maritime lien is, that the may follow the vessel into *bona fide* new ownership.⁷⁷ A maritime lien has therefore been described as "the legal barnacle that clings to the ship's hull".⁷⁸ It is known as a very powerful remedy since it is invisible and arises in circumstances beyond the ken of the new owner.⁷⁹

- the owner of the property to be arrested (the *res*) would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

Furthermore the arrest of maritime property must fall within one or more of the following categories:

- The ship, with or without her equipment, furniture, stores or bunkers;
- The whole or any part of her equipment, furniture, stores or bunkers;
- The whole or any part of her cargo;
- The freight;

⁷⁵ Charnock, *ibid.*, p. I-3.

⁷⁶ *Bankers Trust International Ltd v Todd Shipyard Corporation: The Halcyon Isle* [1980] All ER 197 (PC); Pike, *ibid.*, p. 209.

⁷⁷ Hare, *ibid.*, p. 17.

⁷⁸ Hare, *ibid.*

⁷⁹ Hare, *ibid.*

- Any container, if the claims arises out of or relates to the use of the container on a ship or the carriage of goods by sea or by water otherwise in that container;
- a fund, compromising the proceeds of the sale of any of the aforementioned property, or of any security or undertaking given to prevent or procure such property's arrest or release there from, unless such security or undertaking is given in respect of the particular claim by a particular person.⁸⁰

The procedure in obtaining an arrest *in rem* is, at least in simple cases, very quick and uncomplicated. The claimant must issue an application and a Writ of Summons to the Registrar of the competent court. The Registrar will then usually issue the Writ of Arrest without referring the matter to a judge. Only in difficult cases (e.g. where the defendant has already lodged "arrest security") or where it is provided by the Act, will the Registrar refer the matter to the competent judge, Section 4 of the Rules.⁸¹

Anyhow the applicant needs to aver and prove that:

On a balance of probability:

- That the claim is a "maritime claim" as defined by the Act and that the court has jurisdiction, or will have jurisdiction, to try the merits of the claim upon arrest;
- That the property to be arrested is maritime property amendable to arrest in terms of Section 3 (5);
- That such property is already situated in or is likely to come within the jurisdiction of the court, in which latter event additionally that no other court in South Africa has jurisdiction to arrest;
- That the property to be arrested, the property against which the claim lies or, if that property be a ship, is an associated ship of that "guilty" ship;

⁸⁰ Charnock, *ibid.*, I-3.

⁸¹ Hare, *ibid.*, p. 18.

- That the claimant has no security (to be entitled to a Registrar's arrest), or insufficient security and a genuine and reasonable need for further security (in which event the arrest must be ordered by the court, and the Section 5 (3) security arrest criteria are applicable).

And further and in any event, that the claimant has:

- A maritime lien over the property to be arrested; and/or
- A claim against the owner of the property *in personam*; and/or
- An alternate method of enforcing the claim such as a *vindicatio*;

And finally, on the *prima facie* standard of proof:

- That it has a *prima facie* case on the merits of the underlying claim in respect of which the arrest is sought, based upon facts which if proved would give rise to that cause of action.⁸²

The action commences automatically with the issue of the Writ of Summons and Arrest. This will interrupt any time bar to the claim. If the process issued is not served within 12 months, the action *in rem* will become invalid, if the court has not extended the time period.

The arrest warrant will be served upon the property to be arrested, in the case of a ship by fixing a copy to her mast or other suitable part and by serving upon those in whose control it is found.⁸³

The court is supposed to have the discretion to order an arrest or attachment against a ship, even if it is not, at the time of the issuing of the arrest order, within the area of jurisdiction of the court. The order would then be served once the ship comes into the area of the courts' jurisdiction.⁸⁴

⁸² Hare, *ibid.*, p.18.

⁸³ Hare, *ibid.*, p. 19.

⁸⁴ Charnock, *ibid.*, I-3; Pike, *ibid.*, p. 210.

7.2.3. Security Arrests

Section 5 (3) of the Act states that

“(a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings. (aA) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings. (b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.”

So the claimant must already have any proceeding on its way or intend to do so.

Within a security arrest it is also possible to arrest an associated ship as arrest according to the regulations of the Act dealing with the arrest of associated ships.

It is important to note that, by bringing a security arrest, the claimant does not thereby submit to South African jurisdiction.

The procedure when bringing a security arrest is to bring a substantive application before a judge in which the claimant must establish on a *prima facie* standard of prove:

- That the court has a *prima facie* case on the merits of the maritime claim for which security is sought, based upon facts which if proved would give rise to that cause of action; and
- That the forum in which that claim has been or is to be enforced has jurisdiction to hear the matter,

and further, on a balance of probability:

- That it has a maritime claim as defined by the Act; and
- That its maritime claim is enforceable in South African law (or would be enforceable there but for arbitration or other unsecured court proceedings) by an action *in personam* against the owner of the property to be arrested or by an action *in rem* against such property, including, where appropriate, an associated ship; and
- That the property to be arrested has not previously been arrested nor has security already been given for the same claim of the same claimant; and
- That it has a genuine and reasonable need for security for its claim.⁸⁵

7.3. Immunity of State-Owned Vessels

South Africa is not a party to the 1926 Brussels Convention relating to the Immunity of State-Owned Vessels. The answer lies in the principles of sovereign immunity, a concept which has changed much in recent times with the entry of state-owned vessels into the trading arena in the world sea-lanes.⁸⁶ The question is dealt with in the Foreign States Immunities Act No. 87 of 1981. It states that a foreign state is immune against the South African jurisdiction if not expressly stated otherwise. It is also stated e.g. that a state is not immune against jurisdiction if it is involved in commercial transactions.

Section 11 provides, that a foreign state shall not be immune from the admiralty jurisdiction of any court in South Africa in an action *in rem* against a ship belonging to a foreign state if, at the time when the cause of the action arose, the ship was in use or intended for use for commercial purposes.

⁸⁵ Hare, *ibid.*, p. 36.

⁸⁶ Hare, Draft of chapter 2, p.24.

South African courts have for example authorized the arrest of government owned foreign commercial fishing trawlers⁸⁷ and at least considered to authorize the arrest of a foreign government owned research vessel⁸⁸.

7.4. Claim of Arrest

As the 1952 Arrest Convention, the Act contains no general definition of a “maritime claim”, but a closed list of all maritime claims.

Having a “maritime claim” is the key to South African admiralty jurisdiction.⁸⁹ Without it a claimant will not have access to admiralty jurisdiction in South Africa nor will the High Court in admiralty have jurisdiction.

The list of maritime claims is very extensive and with 32 categories defined it contains much more maritime matters than the 1952 Convention. It effectively covers all causes of action relating to ships and the carriage of cargo.⁹⁰

Section 1 (1) of the Act states that “maritime claims means any claim for, arising out of or relating to:

- ownership of a ship or a share in a ship;
- the possession, delivery, employment or earnings of a ship;
- any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;
- any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or respondentia bond;
- damage caused by or to a ship, whether by collision or otherwise;
- loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship;

⁸⁷ *The Georg Lurich* 1994 (1) SA 857 (C).

⁸⁸ *The Akademik Fyodorov: Government of the Russian Federation v Maritime Expeditions Inc* 1996 (4) SA 422 (C); *The Oscar Jupiter* 1998 (2) SA 130 (D).

⁸⁹ Hare, *ibid.*, p. 3.

⁹⁰ Pike, *ibid.*, p. 206.

- loss of or damage to goods;
- the carriage of goods;
- any container;
- any charterparty;
- salvage;
- towage or pilotage;
- the supplying of goods or the rendering of services;
- carrying of persons or goods to or from a ship;
- paying or disbursements by a master etc.
- remuneration etc. for agents, brokers, attorneys;
- design, construction, repair
- dock, harbour or similar dues;
- employment of master, crew, etc.;
- general average;
- marine insurance;
- forfeiture;
- limitation of liability;
- distribution of a fund
- a maritime lien;
- pollution;
- a judgement or arbitration award;
- wrongful or malicious proceedings;
- piracy, sabotage or terrorism;
- any matter over which the Colonial Courts of Admiralty had jurisdiction in 1890
- any other matter which by the virtue of its nature or subject matter is a marine or maritime matter
- any contribution, indemnity or damages with regard to or arising out of any maritime claim.

The list in Section 1 (1) of the Act thus creates a *numerus clausus* of possible maritime claims.⁹¹ The second last point is known as a “catch-all” definition of a maritime claim.⁹²

7.5. Associated Ship Arrest

As already seen a link between the ship to be arrested and the claim is one prerequisite of an arrest in both, German and South African law. As also seen, the German law offers the possibility to arrest a sister ship instead of the ship in question. The South African law also offers the possibility to arrest a sister ship and even goes further in providing the possibility to arrest an associated ship. The possibilities to arrest sister or associated ships are an exception from the requirement of a link between the ship and the underlying claim.

A sister ship is in simple words a ship that is owned by the same person or company as the ship from which the claim arose. An associated ship is one that on the first glance is not owned by the same person or company but merely controlled by it.

The procedure of associated ship arrests effectively enables a claimant “to pierce the veil” of ship owning companies and arrest vessels which are associated with each other for claims against the ship originally involved in the maritime claim.⁹³

The institute of associated ship arrest must be seen in the context of a big change in the shipping business over the last decades after World War II. There are not many shipping lines left that own a huge fleet of ships under “one judicial roof”. New financing techniques and the rising risk of liabilities for oil pollutions, etc. changed the shipping business.⁹⁴ Most ships today are owned by one-ship or single-purpose companies or ship funds, registered in obscure jurisdictions and sometimes chartered several times to single-purpose companies and so on.

⁹¹ Hare, *ibid.*, p. 3.

⁹² Pike, *ibid.*, p. 206.

⁹³ Pike, *ibid.*, p. 206.

⁹⁴ Hare, *ibid.*, p. 28.

Therefore a maritime claim is sometimes described to be a debt collector's nightmare.⁹⁵

The Act tries to deal with this situation in providing the possibility to arrest an associated ship. Notable is that an associated ship arrest is not possible in relation to a maritime claim as in Section 1 (1) (d) of the Act.

An associated ship arrest, as provided in Section 7 of the Act may take three forms:

1. By the arrest of a ship in the same ownership as the ship against or in respect of which the claim lies (a "sister ship" arrest);
2. By the arrest of a ship owned by a company controlled by a person who controls the company which owned the ship concerned;
3. A combination of 1 and 2 – where one of the ships is owned by the beneficial owner personally and the other by him through the company.⁹⁶

The following chronological criteria apply to ownership and control:

1. Sister ships:

- a. The ship concerned must have been owned by the beneficial owner at the time the claim arose, but need no longer be so owned at the time of arrest.
- b. The associated ship must be owned by the beneficial owner at the time of the commencement of the action, but need not have been so owned at the time the maritime claim arose.

2. Company-owned associated ships:

- a. The associated ship must be owned by the relevant company and that company controlled by the beneficial owner at the time of commencement

⁹⁵ Hare, *ibid.*, p. 27.

⁹⁶ Charnock, *ibid.*, p. I-6.

of the action. A “company” is supposed to be very widely defined to include virtually any legal entity.

b. The ship concerned need only have been owned by the beneficial owner and the company need only have been controlled by the beneficial owner when the maritime claim arose, and not necessarily at the time of the arrest.

3. Directly owned associated ships, where the ship concerned is owned by the company:

a. The associated ship must be owned by the beneficial owner at the time of the arrest.

b. The company need only have been controlled by the beneficial owner and the ship concerned need only have been owned by the “company”, when the maritime claim arose, and not necessarily at the time of arrest.⁹⁷

The nature of a company and the law applicable to the establishment of a company determine whether a person has the power to control a company, directly or indirectly.⁹⁸ This is supposed to be a question of fact and law.⁹⁹ The decision of the Supreme Court of Appeal in the case of *The Heavy Metal* is the leading case concerning the definition of “control”.¹⁰⁰

In *The Heavy Metal*, Smallberger JA stated:

"The subsection elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company he/she shall be deemed (...) to control the company. "Power" is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my

⁹⁷ Charnock, *ibid.*, p. I-6/I-7.

⁹⁸ Hare, *ibid.*, p. 31.

⁹⁹ Hare, *ibid.*

¹⁰⁰ *Belfry Marine Limited v. Palm Base Maritime SDN BHD - The Heavy Metal* 1999 (3) SA 1083 (SCA).

view, the legislature had in mind when referring to "power" and hence to "control". In South African legal terminology that means the person who controls the shareholding of the company. Foreign law is a question of fact. If the appellant wished to make out a case that the law of the Republic of Cyprus differed significantly from the law of South Africa, it should have adduced evidence to that effect. It did not so. Consequently there is no reason to surmise that the applicable law in Cyprus differs materially from that of South Africa."

Hence in *The Heavy Metal* the court held two ships to be "associated" for the purposes of the legislation because the same Cypriot lawyer owned a majority of shares in each of the one-ship companies that owned the ships, even though he did so as nominee for others.¹⁰¹ The court found that both, direct or indirect power to control would be equally sufficient to speak of an association of ships and to bring the relevant provisions of the Act into operation. Direct control is seen in the exercise of the so-called *de jure* control, which is the legal ability to control the fate of a company.¹⁰²

In contrast indirect control is seen in the exercise of the *de facto* control, which is the factual ability to control the fate of a company.¹⁰³

Since the main purpose of the provisions dealing with associated ship arrest is to assist the claimant and not the defendant, the courts have held, that one can even speak of direct or indirect power to control a company if just a minority of shares in a company is owned by the defendant. The meaning of the act is to look beyond the picture presented to the outside world by the real owner of a vessel, which picture may well be a false one designed to conceal his assets from attachment and execution by its creditors.¹⁰⁴

Thus, direct power refers to *de jure* authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the *de facto* position of the person who commands or exerts authority over the person who is recognized to

¹⁰¹ Davies, Martin, „International Perspectives on Admiralty Procedures“.

¹⁰² Hare, *ibid.*

¹⁰³ Hare, *ibid.*

¹⁰⁴ Berlingieri, *ibid.*, I.493, p. 128..

possess *de jure* power (i.e. the beneficial "owner" as opposed to the legal "owner").¹⁰⁵

To determine whether there is an association of ships the courts so far e.g. used the following criteria as evidence:

- The prospecti of the various companies owned by the alleged beneficial owner involved, which described its background and way of conducting business;
- The *modus operandi* of the corporate structure in general, and specifically how it went about acquiring vessels and apportioning management;
- The oral evidence of an individual previously employed by the corporate structure to inspect ships before purchase;
- In-house-publications of the various companies involved;
- The registration and control of the various trusts and companies making up the corporate structure;¹⁰⁶
- Cross-mortgages between vessels;
- Common addresses, directors, etc. of one-ship companies may point towards common control;
- Similar funnel markings, similarity in the names of ships apparently being run as a "fleet";
- The entry of "fleet" in the documents of a P&I Club;
- The substitution of one ship for another und a charter party¹⁰⁷; etc.

Hence, the details of the procedure to prove an association of ships are very complicated and the courts or claimants have to focus on the single case they are dealing with since it is merely impossible to define the criteria in general.

¹⁰⁵ Berlingieri, *ibid.*

¹⁰⁶ Charnock, *ibid.*, p. I-7.

¹⁰⁷ Pike, *ibid.*, p. 213.

7.6. Chartered Vessels

As long as a claimant does not have a maritime lien against a ship, he may generally only arrest a ship or other property that is owned by the debtor.

There are two exemptions in the South African law where a claim may arise against a vessel's charterers.

Firstly, Section 3 (7) (c) states that

"If at any time a ship was the subject of a charter party the charterer or subcharterer, as the case may be, shall for the purpose of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable".

This provisions means that a claimant might enforce his claim against a charterer of the "guilty" ship by arresting an associated ship owned or controlled by the debtor charterer.¹⁰⁸ It is however important to note that the charterer is only deemed to be the owner of the "guilty" ship and that not the charterer of the associated ship is deemed to be her owner.¹⁰⁹

Secondly the Sea Transport Documents Act 2003 provides that under the newly added Section 1 (3) of the Act "For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise".

This means that the ship concerned will be susceptible to arrest in respect of the claim against the demise charterer.¹¹⁰ The wording of the Section gives rise to worry, that it might remove the true owner debtor in its own rights while the charterer is deemed to be the owner.¹¹¹

¹⁰⁸ Hare, *ibid.*, p. 33.

¹⁰⁹ Hare, *ibid.*

¹¹⁰ Charnock, *ibid.*, p. I-8.

¹¹¹ Hare, *ibid.*, p. 34.

7.7. Definition of "Vessel"

In Section 1.1. of the Act a ship is defined as

"any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not".

Offshore production or exploration platforms that have been towed to their position and that rest on the seabed are therefore excluded.¹¹²

It would therefore also not be possible to arrest a ship that is still in construction and not capable of being used on the sea at the time of the intended arrest.¹¹³

7.8. Form of Application

As already mentioned the arrest commences by the issue and service of a Summons and Warrant of Arrest by the Registrar. The claimant or its attorney must also hand in a certification which states, that the claimant has a maritime claim, that the court has or will have jurisdiction on the matter, that the claim gives rise to arrest the property to be arrested, that in the case of an associated ship arrest the ship to be arrested is associated with the "guilty" ship and that there had not been any security given or why that had not been enough.

It is in the Registrars' discretion if he issues the Warrant on the ground of that evidence or whether he refers the matter to a judge.

¹¹² Hare, Draft of Chapter 2, p. 24.
¹¹³ Hare, *ibid*.

7.9. Security of the Arresting Party

There is no automatism for the claimant to be obliged to lodge counter-security. However he must do so with regard to a formal counter application by the defendant or if the court orders him to do so to secure the costs, expenses, etc. as stated in Sections 5 (2) (b) and (c) of the Act.

7.10. Representation by Counsel & Power of Attorney

Powers of Attorney are not required by lawyers or by the court for the purpose of either commencing proceedings or arresting a vessel.¹¹⁴ A barrister might be need if the defendant challenges the action and court proceedings commence.

7.11. Court Hearing

As already mentioned court proceedings do not take place until the arrest is served, unless the Registrar refers the matter to a judge. Thus, all relevant procedures in order to arrest a vessel take place without the knowledge of the defendant.

7.12. Release upon Security

The arrest or attachment of a vessel can be a potential disaster for the person/companies dependent on the operation (owner, charter, etc.), since the vessel will be put off-hire, contracts of carriage of goods may not be fulfilled, etc. Thus the defendant will usually do everything in his power to get the vessel released as soon as possible.

Therefore a defendant might get his vessel released from the arrest by lodging sufficient security for the amount of the claim or the value of the vessel, whichever is the lesser.¹¹⁵

¹¹⁴ Charnock, *ibid.*, p. I-9-

¹¹⁵ Charnock, *ibid.*, p. I-9.

A Release Warrant as well issued by the Registrar will release the vessel. Summarized the following points are important for the release of a vessel upon security:

- An arrest, attachment and a security arrest may be secured in any form satisfactory to the registrar;
- In practice, security is usually offered and accepted by means of a P&I Club Letter of Undertaking, but other forms like cash, bank guarantees are possible as well;
- It does not matter whether the security is given to the Registrar or to the claimant: the giving of security deems the vessel arrested or attached (or to be arrested or attached) as continuing to be under arrest or attachment once the security is lodged;
- If the parties cannot agree to the form and the amount of the security, the Registrar should be approached to make a ruling, after hearing both parties. If the Registrar or the parties are unhappy about the nature or amount of the security tendered, any of them may seek an order from the court.
- The ruling of the Registrar (or the court if approached by either of the parties or by the Registrar) on the nature and or amount of the security is an interlocutory order from which there is no appeal, though the parties may approach the same court if changed circumstances would support a variation of the order.¹¹⁶

7.13. Costs of Court Proceedings

The fees payable to the court are ignorable low.

An Admiral Marshall will take care of the preservation and maintenance of the vessel under arrest. The claimant does not need to lodge security for these costs, but the Marshall may look to the arresting creditor/s, jointly and severally, for reimbursement of all expense reasonably incurred in the

¹¹⁶ Hare, *ibid.*, p. 50.

preservation of the vessel as well as his reasonable remuneration in relation to such expenses.¹¹⁷

The plaintiff may recover the costs of arrest and custody from the defendant if his claim is successful in the end.

The attorney's fees will depend on the degree of complexity and the length of time involved, but will usually amount to between US-\$ 1.000 – US-\$ 2.000 for a “standard” arrest.¹¹⁸

7.14. Time Element

An arrest will be effected immediately and at short notice. An emergency after hours and weekends service will be available if necessary.

As seen, the Warrant of Arrest is issued on an *ex parte* basis without the knowledge of the defendant.

If the defendant ship owner wishes to challenge the merits of the action, he must do so by giving notice to the court within ten days after service of the Summons.

7.15. Auction Sale in the Arrest Proceedings & Priority of Claims

Section 9 of the Act provides the court with a wide discretion to order a sale of arrested property. Section 9 (1) states that “a court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of the Act be sold”.

But any court will be very reluctant to order the sale of an arrested vessel, especially in cases in which the defendant has challenged the arrest.

The courts defined a number of factors to determine whether good reason for a sale exists or not including

¹¹⁷ Charnock, *ibid.*, p. I-11.

¹¹⁸ Charnock, *ibid.*, p. I-11.

- The cost of maintaining the arrest and subsequent deterioration of the applicant's security.
- Whether there is a reasonable prospect that the owner will be able to show that the ground for arrest or attachment is not a good one.
- Deterioration of the vessel and consequently the applicant's security.
- The cost of maintaining the vessel.
- The risk of the vessel escaping from the arrest or attachment.
- The potential prejudice to the owner.
- The state of the market for second-hand vessels of this type.
- The loss of revenue from the vessel.¹¹⁹

The fact that the owner has been unable or unwilling to provide security to the claimant is not a factor to be taken into account in determining whether good reason exists for the sale.¹²⁰

Section 9 (2) states that "the proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court".

Section 9 (3) provides that "any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever".

Section 11 of the Act deals extensively with the ranking of claims against the fund.

7.16. Claims for Damages by the Owner of the Arrested Vessel

Section 5 (4) of the Act provides that *"any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be*

¹¹⁹ Hare, *ibid.*, p. 55.
¹²⁰ Hare, *ibid.*

liable to any person suffering loss or damage as a result thereof for that loss or damage”.

The claimant is required by the court to show that he had an honest belief founded on reasonable grounds that the institution of proceedings was justified in order to prove that he has “reasonable and probable cause”.¹²¹ This “test” is supposed to be similar to the test required in an action for malicious prosecution and also to be subjective and objective.¹²²

¹²¹ Charnock, *ibid.*, p. I-13.
¹²² Charnock, *ibid.*

8. Conclusion

Some people in the shipping business say “South Africa is not only called a haven for arrest, but also a heaven for arrest.”

Even if that is doubtful today, it seems clear, that it is easier to arrest a vessel in South Africa than in Germany.

The major differences in the legal systems are:

- South Africa distinguishes between an action *in personam* and an action *in rem*.

The action *in personam* is directed against the whole property of a person that may be attached. As with an action *in rem* in both legal systems, a *res* is the object of an admiralty action.

In Germany an action *in personam* is however only directed against a person. It can take the following forms: detention, compulsory registration with the police within a certain time limit or the attachment of a passport.¹²³ Hence it is not important for the shipping business.

- In South Africa, a creditor who wishes to enforce a maritime claim in terms of Section 3 (5) of the Act is restricted to the arrest or attachment of the ship, bunkers, cargo or freight.

In German Law a creditor can seize the whole property of the debtor.

- Germany is a party to the 1952 Arrest Convention. As seen the 1952 Convention even takes precedence over the national German law. Therefore a maritime claim according to the 1952 Convention is necessary to arrest a vessel under German law.

¹²³ Schlichting, *The Arrest of Ships in German and South African Law*, p. 226.

A maritime claim is also a necessary precondition in South Africa, but in contrast to the 1952 Convention, the Act acknowledges many more maritime claims.

- In Germany the jurisdiction to order an arrest is vested in the court dealing with the principal matter, as well as in the local courts in whose district the property to be arrested is located. In contrast South Africa has special Admiralty Courts which have jurisdiction in arrest matters.
- Both legal systems allow the arrest of a sister ship. But the South African law goes even further than the German one or the 1952 Convention, by offering the possibility to arrest an associated ship. The South African system does not just aim on the ownership but also on the *de facto* control of the ship. This possibility is an important tool for debtors who wish to arrest a vessel in the single-ship maritime business as it is nowadays.
- Another difference is that in Germany debtors wishing to obtain an arrest will always have to deal with a judge. In South Africa a Registrar usually handles the procedure. But in the case of a remedy, the courts will deal with the matter in both countries.

As résumé of this thesis one can say, that there are differences between the procedure of arrest in Germany and South Africa, which mainly root in the different legal traditions.

The differences might become less if South Africa would become a party to the relevant international conventions one day. That does not seem impossible since the international isolation due to Apartheid has been overcome and since the differences are not that grave as they might appear on the first glance.

This would be a desirable development towards the unification of this important aspect of maritime law. It would even be more desirable if the

relevant international conventions would develop towards a “real” procedural and substantive international law.

Since the shipping business from its nature is one of the most globalized businesses the relevant law should be so as well.

This would be of advantage for all parties involved because everybody would know what to expect.